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Sent: Wednesday, March 23, 2005 2:24 PM
To: Guivetchi, Kamyar
Cc: 'Ann Hayden'; Nick Di Croce; 'Grant Davis'; 'Jack Sullivan'; 'Mary Ann Dickinson'; 'Peter Gleick'; 'Polly Osborne-Smith'; 'Spreck Rosekrans'; 'Bob Wilkinson'; Arnold Whitridge; Carolyn Yale; Betsy Reifsneider; Jonas Minton; Mindy McIntyre
Subject: B-160 comments 3-22

Kamyar,

It's been an interesting experience to wade through new sections of the public review draft of B-160 which reflect positions not really discussed by the Advisory Committee. The bias toward public support for infrastructure that might have few actual beneficiaries and might involve substantial costs to both the environment and public health seems to come out in a number of places. And while there is increasing language devoted to public interest concerns and the protection of public trust assets, that new support is actively undermined in other areas. Some of this is the result of the objective complexity of water management, other instances seem to reflect concentrations of economic and political power in California today. I want to offer a few comments and suggestions which might point to a few areas before the next AC meeting, and which might be improved with a little attention from writers. In addition, the lack of a section in Volume 4 reflecting lessons learned and policy responses to litigation since the last Bulletin continues to present a challenge for public reviewers.

Where the goal of "implement CalFed" is first discussed, the explanatory box is focused on "Delta Improvements" and the circumstances which would support increased delta pumping. This is a distinct endorsement of CalFed as an infrastructure development program. Why wasn't another aspect of the CalFed process selected (eg. "solution principles" or even, God forbid, "ecosystem restoration")? Similar concerns arise in the Box devoted to explaining the "Beneficiary pays" policy where ecosystem restoration is defined as a public "benefit" which must be supported by public dollars, and which somehow cannot be the responsibility of private beneficiaries who have historically behaved as if this is an "externality" that they will never have to confront. Some progress is made in the "Financing" of water projects section in an appendix in Volume 4 where there is a slight discussion of why there might be controversy in establishing "baselines." But the failure to describe injuries to ecological function and public health as "costs" of some water "developments" is telling. It actually demonstrates the bias inherent in DWR analysis.

Another point entailed in the Financing section is that the very promising analysis of strategies to increase equity (environmental justice and public health in disadvantaged communities) starts to bump up against assertions that local interests will be adequately protected when Transnational or Foreign corporations are involved. The boundaries between public and private, and evaluating equity concerns are the distinct province of our democratic political institutions functioning within the limits imposed by our Constitutions and laws. When International entities are involved, the referral of disputes to locally unelected and unaccountable institutions takes away the opportunity to locally define and develop these boundaries and conditions. The strategies which are so promising in the Financing section are no longer actual options. The situations of local rebellion

encountered in many areas where International Corporations are providing "services" in developing countries should be enough to cause a pause of concern. This is not a trivial point.

Regarding the role of "History," I think it's important to preserve the ideas that water management has been experienced and perceived from multiple perspectives, and there is not a single, official "history." This difficulty is not solved merely by citing the Water Education Foundation version. I think it can be improved by having an introductory sentence and making "history" plural, acknowledging that anything written is one version among many. In the Chronology, a note is made regarding the 1884 Court decisions on Hydraulic mining. This early application of the public trust doctrine to water management has to be mentioned in connection with these events. Failure to do so is misleading and tantamount to institutional "malpractice."

I like the new attention to the public trust doctrine, and the box devoted to responsibilities of particular trustee agencies. But I notice that the responsibility of DWR is described as protecting trust assets where "feasible and reasonable" and that of the SWRCB as "where feasible." Where did the "reasonable" come from in the DWR description? It's not that I am against the application of reason to public policy, but reference to current price levels is sometimes a proxy for "reason," and short term price levels are notoriously unreliable as indices of long term public values. This is actually a historically prominent aspect of public trust inquiry and litigation. Short term economic measures have very deliberately been subverted as primary indices of value of public resources or guides for future policy. Especially in a section specifically describing responsibilities for preserving public trust assets, the insertion of a possibly controversial term should be avoided.

In an atmosphere where some might feel that long term contracts are being signed for the provision of public water without adequate public trust review, it is important for public agencies to provide as accurate a description of public trust responsibilities as possible. Similar to the cases of States and Native Tribes, public trust interests are not just another constituency clamoring for recognition on the same basis as others; they have a fundamental role in the social contracts we all subscribe to (knowingly or not). You can't just buy them or ignore them as you can other "property." A healthy respect for the protection of public interests is particularly apt in California today. As I mentioned in my comments on the Highlights section, an instructive tale comes to us from the State of Wisconsin where the Office of the Public Intervenor was eliminated in a move toward "Government Efficiency."

The Attorney General of Wisconsin has conceded that the elimination of the Public Intervenor was a serious mistake, and the example of drinking water quality protection which was almost sacrificed within the practice of the line agencies with those public responsibilities, has particular significance for California Water Planning. But here in California, it is not only the conceivably duplicative office of public intervenor which is suggested for elimination in the interests of "government efficiency," it is the bedrock protectors of public interests which are being proposed for elimination and merger. We don't even have a "Public Intervenor." Instead of protecting water as a public resource within a single department, the Governor's advisors have suggested merging those responsibilities in an

"Infrastructure" Department where trust responsibilities would be quickly forgotten. Last Fall, total elimination was proposed for the State Lands Commission, which was itself created as a response to governmental corruption by private interests.

It is vitally important that information concerning public institutions which protect public interests and values be presented as accurately as possible in this water plan. Thanks for your attention to these comments.

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